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RESPONSE REQUESTED

Supreme Court, U.S.
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No. 00-6933

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1999

REMON LEE,

Petitioner,

vs.

MICHAEL KEMNA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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10 pp

QUESTIONS PRESENTED

Whether the court below erred in finding a claim that a state trial court violated due process, by denying a defense request for continuance, to be procedurally barred.

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STATEMENT OF CASE

Petitioner Remon Lee was convicted of murder after two eyewitnesses identified him as the driver of the getaway vehicle used in a murder. Two different witnesses placed Petitioner at the scene of the murder with his accomplice on the night before the killing. Both these witnesses indicated the accomplice asked about the victim.

At trial Petitioner allegedly intended to present his mother, stepfather and sister to testify that Petitioner was in California from July 1992 to October 1992 and therefore could not have committed a murder in Missouri in August 1992.

The witnesses however left the courthouse during trial and the trial court declined to grant a continuance. Trial defense counsel could not explain their disappearance and told the court the witnesses may have been threatened, but he had no proof of that, or that they may have abandoned his client.

At the hearing on the motion for new trial neither Petitioner nor his attorney mentioned an allegation that the family witnesses had been told they could leave by a court officer. Counsel in fact told the court during a post-trial hearing held nearly two months after trial that the witnesses left and went back to California but did not mention any alleged permission to leave given by a court officer and Petitioner himself did not complain about this, although he complained that his accomplice was not called as a witness in his behalf.

Later, in a state post-conviction motion it was alleged that an unknown person believed to be working for the Jackson County prosecutor who told the witnesses their testimony would not be needed. The claim raised in federal habeas corpus position was

that a court officer told the witnesses to leave. This claim was supported by affidavits.

The Missouri Court of Appeals rejected the claim that denying the continuance violated due process finding the claim was procedurally barred because the motion for continuance did not comply with Missouri Supreme Court Rule 24.09, requiring continuance motions be in writing and Rule 24.10 stating what information must be presented in a motion for continuance. The Missouri Court of Appeals in an alternate holding found the claim to be meritless. The district court agreed with the procedural bar and merits analysis. The court below found the claim to be procedurally barred.

Reasons for Denying the Writ

This case presents no real conflict between the decision of the court below and a decision of this Court or another court of appeals. The court below has simply applied existing precedent to a complicated, and very case specific, set of facts.

Nothing in the decision of the court below conflicts with the principles of ***Ylst v. Nunnemaker***, 501 U.S. 797 (1991). The Missouri Court of Appeals in alternate holdings found both that the substantive claim raised was procedurally barred and that it was meritless. In such a case the jurisprudence of this Court dictates that a bar be enforced, as it was in this case. Similarly no conflict exists with ***Davis v. Wechsler***, 263 U.S. 22 (1993). ***Davis*** dealt with the proper venue for a personal injury suit involving a federally controlled railroad and a decision that an objection to jurisdiction was waived by appearance. It has nothing in particular to do with the decision of the court below. Finally, the decision of the court below in no way conflicts with this Court's decision in ***Schlup v. Delo***, 513 U.S. 89 (1995). The alibi testimony Petitioner alleges shows his innocence in this case is neither new nor does it establish that no reasonable juror would have convicted. The alibi affidavits all from relatives of Petitioner by blood or marriage are refuted by the testimony of four disinterested eyewitnesses and, in any event could have been but were not presented at the proper time in state court. No conflict with ***Schlup*** exists.

Smart v. Scully, 787 F.2d 816 (2nd Cir. 1986) is a case in which the Second Circuit found no procedural default occurred when a movant failed to swear to the allegations in a post-conviction relief motion. ***Smart*** has little factually in common with

case except that both involved alleged procedural defaults. Failure to place a claim in writing and failing to set out the proper elements to obtain relief as occurred in this case, are much greater omissions than merely failing to append on oath at the end of an otherwise proper written pleading as occurred in ***Smart***. ***Christoffel v. United States***, 190 F.2d 585 (D.C. Cir. 1950) is a half century old federal criminal case ruling on a motion to extend the time to file a notice of appeal. It has nothing to do with the decision of the court below.

The decision of the court below applies well established principles concerning procedural default to a very specific set of state procedural rules and state cases applying those rules. The decision does not directly conflict with any particular decision of this Court or of any circuit court of appeals. Petitioner is essentially arguing an error occurred in applying well established case law to a narrow fact pattern. This is not a proper case for certiorari review.

CONCLUSION

WHEREFORE, Respondent prays that the petition for certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that one (1) true and correct of Respondent's Brief in Opposition to petition for writ of certiorari to the United States Court for the Eighth Circuit in the case of ***Lee v. Kemna*** was forwarded pursuant to Supreme Court Rule 29.5(b), postage prepaid this 5th day of January, 2001, to:

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Ten (10) copies of Respondent's Brief in Opposition were mailed this 5th day of January, 2001, to:

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